

groupings on Comcast systems where news channels are organized by genre now or in the future. Such a result is not consistent with the plain terms of the news neighborhooding condition, and it is not consistent with the Commission's recognition in the FCC Order of the "special importance of news programming to the public interest."<sup>167</sup> Neither does Bloomberg believe that Comcast's interpretation reflects the Commission's intent in adopting this condition.

#### IV. COMCAST GREATLY EXAGGERATES ANY BURDENS ASSOCIATED WITH IMPLEMENTING THE NEWS NEIGHBORHOODING CONDITION

In its Answer, Comcast presents a parade of horrors of what will occur if it is required to abide by the plain meaning of the news neighborhooding condition.<sup>168</sup> As will be discussed below, these claims are substantially exaggerated and belied by experience. Before responding to them, however, it is important to note that these policy arguments have no place in this proceeding because they address whether the news neighborhooding condition should have been imposed in the first place rather than what the condition means.

If Comcast believed that the news neighborhooding condition as written was too burdensome, it could have filed a petition for reconsideration with the Commission.<sup>169</sup> Alternatively, Comcast could have rejected the Commission's grant of its application and proceeded to an administrative hearing.<sup>170</sup> It did neither of these things. Rather, it and NBCU "accept[ed] as binding the conditions and enforceable commitments included in the [FCC Order] and expressly waive[d] any right they may have to challenge the Commission's legal authority to adopt and enforce such conditions and commitments."<sup>171</sup> Accordingly, Comcast now may not complain that it is too

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<sup>167</sup> FCC Order at 4287, ¶ 122.

<sup>168</sup> See Answer, ¶¶ 71-87.

<sup>169</sup> See 47 C.F.R. § 1.106.

<sup>170</sup> See 47 C.F.R. § 1.110.

<sup>171</sup> See *supra* note 6.

burdensome for the company to comply with the news neighborhooding condition. Comcast cannot gain the substantial benefits resulting from its merger with NBCU and then contest, after the fact, the validity of the very conditions that allowed it to obtain those benefits.

Comcast seeks to evade this problem by recasting its arguments in an interpretive light. Comcast claims, in essence, that Bloomberg's interpretation of the condition must be wrong because it is inconsistent "with the Commission's intent to minimize disruptions to consumers and other programming networks."<sup>172</sup> As discussed below, however, there is one rather large problem with this argument; Comcast is unable to point to a single passage in the FCC Order where the Commission expressed any such intent.

**A. Comcast's Frequent Channel Changes Substantially Undermine Its Claim that the News Neighborhooding Condition Imposes Substantial Burdens**

Turning to the merits of Comcast's argument that implementation of the news neighborhooding condition "would impose substantial costs, disruption and burden on Comcast's customers and on displaced television networks,"<sup>173</sup> Comcast sets forth a litany of problems that will allegedly ensue if Comcast is required to move BTV into existing news neighborhoods:

(1) Customers will be confused and frustrated by not being able to find their favorite channels because popular programming networks will need to be relocated;<sup>174</sup> (2) Comcast's customer service representatives will be overwhelmed by high call volumes;<sup>175</sup> (3) Comcast will incur significant

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<sup>172</sup> See Answer at 36.

<sup>173</sup> *Id.*, ¶ 71.

<sup>174</sup> *Id.*, ¶ 80.

<sup>175</sup> See *id.*, ¶ 81.

costs;<sup>176</sup> and (4) Comcast will have to perform substantial physical engineering work at each affected headend.<sup>177</sup>

These complaints, however, ring hollow when one examines the frequency with which Comcast changes channel positions on its headends. Comcast regularly (and voluntarily) relocates channels on its headends and is able to manage the burdens associated with those changes. As a result, there is no reason to think that Comcast will be unable to deal successfully with implementation of the news neighborhooding condition.

Comparing Comcast's channel lineups from 2010 and 2011, Professor Crawford has found that Comcast moved networks *at least 10,625 times* in an approximately eleven-month period.<sup>178</sup> This statistic, moreover, only counts those networks that were moved from one location on the channel lineup to another or were given a second location and does not count networks that were added or dropped from headends during these eleven months. In the 35 most-populous DMAs, networks were relocated at least 6,806 times.<sup>179</sup> When looking both at all Comcast headends as well as those located in the 35 most-populous DMAs, at least 3.6% of networks were relocated during just this eleven-month period.<sup>180</sup>

While Comcast claims that changing channel positions between 1-99 is particularly burdensome,<sup>181</sup> Comcast also regularly relocates networks within that channel range. During the same eleven-month period, Comcast moved networks *at least 1,752 times* between channels 1-99, and

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<sup>176</sup> See *id.*, ¶¶ 83-86.

<sup>177</sup> See *id.*, ¶ 85.

<sup>178</sup> Ex. A, ¶ 106.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Answer, ¶¶ 72, 82.

at least 2.8% of such networks were relocated in that channel range.<sup>182</sup> Therefore, networks located between channels 1-99 were relocated at only a slightly lower rate than all networks (2.8% vs. 3.6%).<sup>183</sup> These aggregate statistics demonstrate that Comcast is quite capable of instituting whatever channel changes are necessary to include BTV in existing news neighborhoods. A review of some recent specific channel changes is also illuminating because these moves reveal that Comcast is more than happy to deal with any burdens associated with relocations in order to benefit its own networks.

Culpeper, VA (Washington DC DMA)<sup>184</sup> – Between 2010 and 2011, Comcast reorganized the news channels located between channels 1-99 on the Culpeper headend. HLN was moved from channel {█} to channel {█}, CNN was moved from channel {█} to channel {█}, and Fox News was moved from channel {█} to channel {█}.<sup>185</sup> These channel changes placed CNBC, which remained at channel {█}, in a four-channel news neighborhood.<sup>186</sup>

In Culpeper, Comcast also moved Comcast SportsNet from channel {█} to channel {█} so that it would be located next to ESPN, ESPN2, and MASN which are now located at channels {█}, {█}, and {█}.<sup>187</sup> In order to make this change, Comcast moved Lifetime from channel {█} to channel {█}.<sup>188</sup>

<sup>182</sup> Ex. A, ¶ 108. With respect to headends located in the 35 most-populous DMAs, at least 2.4% of networks between channels 1-99 were moved from 2010 to 2011.

<sup>183</sup> *Id.*, ¶¶ 106, 108.

<sup>184</sup> This headend also serves customers in {█}

<sup>185</sup> *See* Ex. I.

<sup>186</sup> *See Id.*

<sup>187</sup> *See Id.*

<sup>188</sup> *See Id.*

{{

[REDACTED]		
	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]		
	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

}}

Martinsburg, WV (Washington DC DMA)<sup>191</sup> – Between 2010 and 2011, Comcast moved CNBC from channel {{[REDACTED]}} to channel {{[REDACTED]}} on the Martinsburg headend so that it would be next to CNN, HLN, and MSNBC.<sup>192</sup> At the same time, it moved Fox News from channel {{[REDACTED]}}

<sup>189</sup> See *Id.*

<sup>190</sup> See *Id.*

<sup>191</sup> This headend also serves customers in {{[REDACTED]}}

<sup>192</sup> See Ex. I.

to channel {{[REDACTED]}} so that it would also be in this new news neighborhood.<sup>193</sup> In order to include CNBC and Fox News in this new news neighborhood, Comcast chose to change the channel positions of Lifetime, AMC, Spike TV, and TBS.<sup>194</sup> Notably, TBS is one of the networks that Comcast specifically complains about potentially having to move if the news neighborhooding condition is implemented.<sup>195</sup>

{{

[REDACTED]		
	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

}}

Detroit, MI (Detroit, MI DMA)<sup>197</sup> – Between 2010 and 2011, Comcast moved Comcast-affiliated channels The Golf Channel from channel {{[REDACTED]}} to channel {{[REDACTED]}} and Versus from channel {{[REDACTED]}} to channel {{[REDACTED]}} on its Detroit headend so that they would be located in a sports neighborhood with Fox Sports Detroit, ESPN2, and Speed Channel, which were moved to channels

<sup>193</sup> See *Id.*

<sup>194</sup> See *Id.*

<sup>195</sup> See Answer, ¶ 73.

<sup>196</sup> See Ex. I.

<sup>197</sup> This headend also serves customers in {{[REDACTED]}}

{{[REDACTED]}}, {{[REDACTED]}}, and channels {{[REDACTED]}}, respectively.<sup>198</sup> Channels {{[REDACTED]}} and {{[REDACTED]}} were left empty so that the neighborhood had five consecutive sports channels.<sup>199</sup> In order to create this neighborhood with the Golf Channel and Versus, Comcast chose to change the channel positions of networks such as The Cartoon Network, Nickelodeon, and A&E.<sup>200</sup> Notably, A&E and the Cartoon Network are two of the networks that Comcast specifically complains about potentially having to move if the news neighborhooding condition is implemented.<sup>201</sup>

 $\{\}$ 

[REDACTED]		
	[REDACTED]	[REDACTED]
[REDACTED]		
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	
[REDACTED]	[REDACTED]	[REDACTED]

} }

<sup>198</sup> See Ex. I.

<sup>199</sup> *See Id.*

<sup>200</sup> *See Id.*

<sup>201</sup> See Answer, ¶¶ 73, 78.

<sup>202</sup> See Ex. I.

Indianapolis, IN (Indianapolis, IN DMA)<sup>203</sup> – Between 2010 and 2011, Comcast moved The Golf Channel from channel {█} to channel {█} and Versus from channel {█} to channel {█} on its Indianapolis headend so that its affiliated channels would be located in a sports neighborhood with the ESPN, ESPN2, and the Big Ten Network, which were moved to channels {█}, {█}, and {█}, respectively.<sup>204</sup> Channel {█} was left empty so that the neighborhood had five consecutive sports channels.<sup>205</sup> In order to create this neighborhood with the Golf Channel and Versus, Comcast chose to change the channel positions of networks such as A&E, ESPN, and TNT.<sup>206</sup> Notably, A&E and ESPN are two of the networks that Comcast specifically complains about potentially having to move if the news neighborhooding condition is implemented.<sup>207</sup>

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<sup>203</sup> This headend also serves customers in {█}

<sup>204</sup> *See* Ex. I.

<sup>205</sup> *See Id.*

<sup>206</sup> *See Id.*

<sup>207</sup> *See* Answer, ¶¶ 73, 78.



{ {

[REDACTED]		
	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

} }

Amherst, VA & Lynchburg, VA<sup>209</sup> (Roanoke/Lynchburg, VA DMA) – Between 2010 and 2011, Comcast moved CNBC from channel { [REDACTED] } to channel { [REDACTED] } and MSNBC from channel { [REDACTED] } to channel { [REDACTED] } on its Amherst and Lynchburg headends so that they would be part of a news neighborhood that also includes Cable News Network, HLN, and Fox News Channel, which are located on channels { [REDACTED] }, { [REDACTED] }, and { [REDACTED] }, respectively.<sup>210</sup> In order to move MSNBC into the news neighborhood, Comcast chose to relocate the Discovery Channel,<sup>211</sup> one of the networks that it specifically complains about potentially having to move if the news neighborhooding condition is implemented.<sup>212</sup>

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<sup>208</sup> See Ex. I.

<sup>209</sup> This headend also serves customers in { [REDACTED] }

<sup>210</sup> See Ex. I.

<sup>211</sup> See *Id.*

<sup>212</sup> See Answer, ¶ 78.

At the same time, Comcast also moved Comcast SportsNet from channel {{REDACTED}} to channel {{REDACTED}} so that it would be positioned by ESPN and ESPN2, which are located on channels {{REDACTED}} and {{REDACTED}}.<sup>213</sup> In order to relocate Comcast SportsNet, Comcast chose to relocate AMC.<sup>214</sup>

[illegible]

Madison, FL (Tallahassee, FL DMA)<sup>216</sup> – Between 2010 and 2011, Comcast moved CNBC from channel {█} to channel {█} and MSNBC from channel {█} to channel {█} so that they would be part of a news neighborhood with CNN (which was moved from channel

<sup>213</sup> See Ex. I.

<sup>214</sup> *See Id.*

<sup>215</sup> See *Id.*

<sup>216</sup> This headend also serves customers in {{REDACTED}}.

{{█}} to channel {{█}}, Fox News (which was moved from channel {{█}} to channel {{█}}), and HLN (which was moved from channel {{█}} to channel {{█}}) on the Madison headend.<sup>217</sup>

In order to create this news neighborhood, Comcast chose to relocate A&E and TBS,<sup>218</sup> two of the networks that it specifically complains about potentially having to move if the news neighborhooding condition is implemented.<sup>219</sup>

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█		
	█	█
█	█	█
█	█	█
█	█	█
█	█	█
█	█	█
█	█	█
█	█	█
█	█	█

}}

Quitman, FL (Tallahassee, FL DMA) – Between 2010 and 2011, Comcast placed CNBC on channel {{█}} and MSNBC on channel {{█}} so that they could be in a news neighborhood on the Quitman headend with CNN (which was moved from channel {{█}} to channel {{█}}), Fox

<sup>217</sup> See Ex. I.

<sup>218</sup> See *Id.*

<sup>219</sup> See Answer, ¶ 73.

<sup>220</sup> See Ex. I.

News (which was moved from channel {█} to channel {█}), and HLN (which was moved from channel {█} to channel {█}).<sup>221</sup>

At the same time, Comcast moved the Golf Channel from channel {█} to channel {█} and Comcast SportsNet from channel {█} to channel {█} so that they could be located in a sports neighborhood with Sun Sports, Fox Sports Florida, and ESPN2, which were moved to channels {█}, {█}, and {█}, respectively.<sup>222</sup> In order to create these new news and sports neighborhood, Comcast chose to relocate TBS and Turner Classic Movies,<sup>223</sup> two of the networks that it specifically complains about potentially having to move if the news neighborhooding condition is implemented,<sup>224</sup> as well as such popular networks as the Disney Channel, Nickelodeon, and Lifetime.<sup>225</sup>

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<sup>221</sup> See Ex. I

<sup>222</sup> *Id.*

<sup>223</sup> See *id.*

<sup>224</sup> See Answer, ¶¶ 73-74.

<sup>225</sup> Similarly, in 2008, Comcast moved the Golf Channel, which it owns, from Channel 65 to Channel 31 in Pittsburgh so that it would be positioned next to other sports channels. MSNBC was previously located on Channel 31, and was moved to Channel 183. See Dec. 8, 2010 Ex Parte at 6.

{

[REDACTED]		
	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]		
	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

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Comcast's argument about the harms associated with displacing "popular networks" is also seriously undermined by the number of times that it moved such networks from 2010 to 2011. In channel positions below 100, for example, Comcast moved: (1) the History Channel ninety-one

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<sup>226</sup> See Ex. I

<sup>227</sup> See *id.*

times;<sup>228</sup> (2) TBS twenty-seven times;<sup>229</sup> (3) the Cartoon Network twenty-six times;<sup>230</sup> (4) USA twenty-three times;<sup>231</sup> (5) Comedy Central twenty times;<sup>232</sup> (6) AMC and Bravo nineteen times;<sup>233</sup> (7) FX sixteen times;<sup>234</sup> (8) the Discovery Channel eleven times;<sup>235</sup> and (9) ESPN ten times.<sup>236</sup> Significantly, these changes were voluntarily made by Comcast and did not result from any Commission mandate.

Moreover, Comcast has moved its own affiliated channels from channel positions above 100 to channel positions below 100 many times in the past year. This has happened seventy-seven times with respect to ShopNBC and ten times with respect to G4.<sup>237</sup> Indeed, on the Athens, VT headend in the Boston DMA, MSNBC was recently placed on channel {█} (while also retaining its prior position at channel {█}).<sup>238</sup> In sum, as longtime cable industry executive Don Mathison explains, the data “shows conclusively that Comcast has in general changed channel lineups frequently, and in particular, has done so to reorganize channels over the last year so that news and sports content affiliated with Comcast appears in the principal news and sports neighborhoods. Comcast has done this to put affiliated news and sports content in the neighborhoods that contain the major news and sports channels respectively.” *See* Ex. E, ¶ 20.

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<sup>228</sup> Ex. A, ¶ 110.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at n.18.



**B. Comcast Dramatically Overstates the Burdens Imposed by Implementing the News Neighborhooding Condition**

Given how often Comcast relocates networks on its headends, including those placed between channels 1-99, it should come as no surprise that Comcast in its Answer dramatically overstates any burdens that would be associated with implementing the news neighborhooding condition as written.

To begin with, Comcast's claim that "substantial physical engineering work" would need to be performed "at each affected system headend each time a relocation was required" is inaccurate.<sup>239</sup> While Comcast's Answer refers to channels 1-99 as "analog,"<sup>240</sup> it has completed migrating approximately { [REDACTED] } percent of its expanded basic channel lineups to digital.<sup>241</sup> And on those headends where the digital conversion has been completed, it would be exceptionally easy from a technical perspective for Comcast to move BTV into existing news neighborhoods and relocate any other channels as required. As industry expert Adam Goldberg explains, moving a network in digital format "from one channel position to another is not complicated from an engineering perspective."<sup>242</sup> This is because "channel numbers displayed to users in a digital cable television system are unrelated to the frequency used to transmit the audiovisual content to users."<sup>243</sup> As a result, changing the channel number of a network (such as BTV) can be accomplished simply by

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<sup>239</sup> Answer, ¶ 85.

<sup>240</sup> *Id.*, ¶ 21.

<sup>241</sup> Answer, Ex. 3, ¶ 20. Once a system is converted to digital, only 20-30 channels remain in analog format. Derek Harrar, *Going "All Digital" - Tons more HD and a Faster Internet*, Comcast Voices (May 1, 2009), <http://blog.comcast.com/2009/05/going-all-digital-tons-more-hd-and-a-faster-internet.html>; Comcast Corp., *1st Quarter 2009 Results*, Investor Relations: Events & Presentations, 10 (Apr. 30, 2009), [http://files.shareholder.com/downloads/CMCSA/1246461593x0x299980/14788882-8cdb-4355-89d3-fc3dd49e518a/1Q\\_2009slides.pdf](http://files.shareholder.com/downloads/CMCSA/1246461593x0x299980/14788882-8cdb-4355-89d3-fc3dd49e518a/1Q_2009slides.pdf).

<sup>242</sup> Ex. G, ¶ 14.

<sup>243</sup> *Id.*

changing software settings in the devices that update and maintain the “system information” for the cable system.<sup>244</sup> Such updates are both common and simple.<sup>245</sup>

Even for the { [REDACTED] } of Comcast headends where existing news neighborhoods are currently carried in analog format, it would take minimal engineering work to relocate BTV and make any other necessary channel changes. Specifically, moving a network from one channel position to another under such circumstances only involves slight changes to a system’s channel distribution configuration. Such changes may involve software configuration changes or at most could involve physically swapping a pair of cables at a headend.<sup>246</sup> In short, Adam Goldberg explains that “changing channel positions in an analog environment is still relatively simple from an engineering perspective. The changes necessary to move analog channels within the lineup may involve a small amount of operational work to reconfigure system information or swap cables at headends, but do not require widespread or overly burdensome engineering tasks.”<sup>247</sup>

Indeed, Comcast does not provide any substantiation for its contention that “substantial physical engineering work” would need to be performed whenever any channel relocation occurred on any headend. Rather, the Declaration submitted by its own Vice President of Video Services states: “Typically there are minimal physical engineering changes associated with channel realignments on any given system . . . .”<sup>248</sup>

Comcast also contends that many broadcast stations with must-carry rights are located between channels 1-99, and that relocating such stations “is out of the question.”<sup>249</sup> This argument,

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<sup>244</sup> See *id.*, ¶ 17.

<sup>245</sup> See *id.*, ¶ 18.

<sup>246</sup> See Ex. G, ¶ 20.

<sup>247</sup> *Id.*, ¶ 21.

<sup>248</sup> Answer, Ex. 3, ¶ 20.

<sup>249</sup> *Id.*, ¶ 72.



however, is a red herring. Broadcast stations are generally not located near the news neighborhoods identified by Bloomberg in its Complaint. Indeed, Comcast in its Answer does not provide *a single example* of a headend where the presence of a must-carry broadcast station would prevent Comcast from moving BTV into existing news neighborhoods. As such, the Commission should not take Comcast's objection seriously.

In addition, Comcast argues that if it is required to move BTV into existing news neighborhoods, it will also have to move many other independent news channels into those neighborhoods, thus compounding the burdens associated with channel relocations. Specifically, Comcast claims that, on the headends identified by Bloomberg, there are an average of {█} independent news channels besides BTV that would need to be moved.<sup>250</sup> It does not, however, claim that any of these channels have asked to be relocated pursuant to the news neighborhooding condition in the approximately seven months that it has been in effect. Comcast's figure, moreover, is quite exaggerated for two reasons. First, as reviewed above, Comcast in its Answer significantly over-counts on the number of news channels on its headends,<sup>251</sup> and thus also significantly overstates the number of independent news channels that it carries. Second, the substantial majority (between {█}) of the {█} independent news channels per headend other than BTV counted by Comcast<sup>252</sup> are C-SPAN, C-SPAN2 and C-SPAN3 (the "C-SPAN Channels"),<sup>253</sup> and it is highly questionable whether those networks, which were created by and are controlled by cable operators, qualify as independent news channels for purposes of the news neighborhooding

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<sup>250</sup> See Answer, ¶ 75.

<sup>251</sup> See *supra* Section III.A.3.

<sup>252</sup> See Answer, ¶ 75.

<sup>253</sup> In the 369 headends at issue, C-SPAN is carried 262 times outside of the news neighborhood in which Bloomberg is requesting that BTV placed. The figures for C-SPAN 2 and C-SPAN 3 are 324 and 337, respectively. See Ex. A, ¶ 70. Accordingly, the C-SPAN networks are carried, on average, on {█} channels outside of the relevant neighborhoods in these 369 headends, which is {█} of Comcast's {█} figure.

condition. Third, as set forth below, it is unlikely that there will be a new, independent news channel in the near future, given the capital investment required for such a programming channel.

To be clear, the C-SPAN Channels provide a valuable public service by airing live coverage of the United States House of Representatives and Senate, candidate speeches and debates, press conferences and other public affairs programming.<sup>254</sup> C-SPAN, however, is “a private non-profit service of the cable industry” and is run by a Board of Directors that is “comprised of executives from large and small cable television operating companies.”<sup>255</sup> Most importantly, for present purposes, Neil Smit, President of Comcast Cable Communications, LLC, currently sits on C-SPAN’s Board of Directors.<sup>256</sup> To qualify as an independent news channel and thus benefit from the news neighborhooding condition, a network must be unaffiliated with Comcast, and the FCC Order does not provide a specific definition of affiliation. Nevertheless, given Comcast’s close ties to C-SPAN, there is a strong possibility that the C-SPAN Channels do not qualify as an independent news channels, and Comcast is free to make that argument should C-SPAN ever seek to benefit from the news neighborhooding condition.<sup>257</sup> Indeed, given Comcast’s relationship with C-SPAN, it would be rather surprising if C-SPAN chose to provoke a confrontation with Comcast by even raising the issue.

In a related argument, Comcast expresses the fear that a plethora of new independent news channels will be come into existence while the news neighborhooding condition is in effect and

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<sup>254</sup> Steven Waldman and the FCC Working Group on Information Needs of Communities, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, June 2011, available at <http://www.fcc.gov/info-needs-communities>.

<sup>255</sup> See Complaint, ¶ 46.

<sup>256</sup> *Id.*

<sup>257</sup> The board of director’s position in a cable company or a broadcast station makes the director’s interest attributable and likely triggers affiliation. See 47 C.F.R. § 73.3555 note 2(g).

could serve as “an ongoing source of incessant and increasing disruption.”<sup>258</sup> Based on the substantial barriers to entry present in the cable news business, however, the likelihood that a multitude of new independent news networks will be created over the next six-and-a-half years (or that many networks of other genres will become news channels) is quite small.<sup>259</sup>

While Comcast also raises the prospect that the company may choose to spin off one of its news channels, thus turning into an independent news channel,<sup>260</sup> this is not a valid concern. To begin with, whether Comcast chooses to spin off one of its news channels is a matter entirely within Comcast’s control, and the company can factor into any such decision the possibility that the news neighborhooding condition may apply to such a channel. Moreover, Comcast is free to argue to the Commission that a news channel affiliated with Comcast as of the date of the merger may not be considered an “independent news channel” for the life of the news neighborhooding condition.

### **C. Any Burdens Imposed by the News Neighborhooding Condition Are Quite Manageable**

While Comcast substantially exaggerates any disruptions associated with implementing the news neighborhooding condition as written, Bloomberg does not deny that some costs and burdens may result. Experience strongly suggests, however, that they are likely to be quite manageable. *See*

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<sup>258</sup> Answer, ¶ 76.

<sup>259</sup> In its recent Future of Media Report, the FCC found that barriers to entry were reduced for news on the internet, but made no similar finding with respect to more traditional news, including cable television news. Steven Waldman and the FCC Working Group on Information Needs of Communities, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, June 2011, available at <http://www.fcc.gov/info-needs-communities>. Large investments are required to put together a newsgathering operation. In fact, Fox Business Channel, the last major business news network to launch, has been in operation for nearly four years and has yet to turn a profit. The State of the News Media 2011: An Annual Report on American Journalism, Cable: By the Numbers, available at <http://stateofthemediamedia.org/2011/cable-essay/data-page-2/> (last visited Aug. 28, 2011). In 2006, SNL Kagan { [REDACTED] } Derek Baine, *Fox News cuts Deal with Cablevision*, SNL Kagan: Economics of Networks, Oct. 24, 2006, available at <http://www.snl.com/interactivex/article.aspx?id=5766917&KLPT=6> (subscription required).

<sup>260</sup> *See* Answer, ¶ 76.

Ex. C, ¶ 36. Industry executive Susan Arnold states that in her experience, “changes to channel lineups did not create a troubling call volume [from customers] if the proper marketing and consumer communications actions were taken in advance of, and concurrently to, those lineup changes.” Ex. F, ¶ 29. Indeed, if Comcast can successfully implement over 10,000 channel changes from 2010 to 2011, including over 1,700 movements between channels 1-99,<sup>261</sup> then it is quite capable of handling any channel relocations that will be necessary to comply with the news neighborhooding condition. Indeed, many of the costs identified by Comcast (*e.g.*, notifying customers, printing new channel lineups, changing databases) would be incurred whenever Comcast added, dropped, or moved a channel, and in the same eleven-month period, Comcast did one of those three things at least 48,400 times.<sup>262</sup> Furthermore, Comcast should not be allowed to carry out channel relocations between channels 1-99 that work to the benefit of its affiliated channels (*e.g.*, CNBC, MSNBC, Versus, G4, and the Golf Channel),<sup>263</sup> and then claim that such channel relocations are too burdensome when they are required by the news neighborhooding condition.<sup>264</sup>

Any costs and burdens imposed upon Comcast, moreover, must be considered in light of the size of the company and the record of the Comcast/NBCU transaction. While Comcast claims

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<sup>261</sup> See *supra* Section IV.A.

<sup>262</sup> See Ex. A, ¶¶ 102, 106.

<sup>263</sup> See *supra* Section IV.A.

<sup>264</sup> While Michael Egan claims that Comcast’s agreements with other networks might have to be renegotiated in order for it to comply with the news neighborhooding condition, see Answer, Ex. 4, ¶ 40, the Commission and Bloomberg both requested during the merger proceeding that Comcast produce its carriage agreements. In re Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licenses, *Information and Discovery Request for Comcast Corp.*, MB Docket No. 10-56 (released May 21, 2010); Letter from Stephen Diaz Gavin, Counsel for Bloomberg L.P., to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 16, 2010). Bloomberg, in particular, asked that Comcast comply with the Commission’s request for such agreements in order to assess Comcast’s claim that those agreements could impede Bloomberg from complying with a neighborhooding condition. Letter from Stephen Diaz Gavin, Counsel for Bloomberg L.P., to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 21, 2010). Notably, Comcast never produced any such agreements (nor have they presented any such agreements in this proceeding).

that relocating BTV will cost the company { [REDACTED] },<sup>265</sup> the merged entity has been valued at over \$37 billion.<sup>266</sup> CNBC alone has been estimated to earn between \$300 and \$400 million a year.<sup>267</sup> Meanwhile, the company has been thriving since the merger. Comcast's second quarter 2011 revenue increased by 50.5% from the second quarter of 2010 (in part due to the NBCU purchase), and NBC Universal's revenue increased by 17.1% during the same time period.<sup>268</sup> Moreover, Comcast argued to the Commission that the merger would result in significant cost reductions for the two companies.<sup>269</sup> Thus, even if Comcast's cost estimates were correct, the costs associated with channel relocations are quite small and manageable when compared to the size of the company and the benefits that it received because of the Commission's approval of the Comcast-NBCU merger.<sup>270</sup>

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<sup>265</sup> See Answer, ¶ 85. Comcast in its Answer and supporting materials nowhere provides a specific cost breakdown to justify this estimate.

<sup>266</sup> The Comcast/NBCU entity was valued at \$37.25 billion when the deal was announced on December 3, 2009. Comcast Corporation, Comcast and GE to Create Leading Entertainment Company, Investor News (Dec. 3, 2009), <http://www.cmcsk.com/releasedetail.cfm?ReleaseID=427988>.

<sup>267</sup> See Complaint at 5 n.7.

<sup>268</sup> Comcast Corp., *Comcast Reports 2nd Quarter 2011 Results*, Investor News (Aug. 3, 2011), <http://www.cmcsk.com/releasedetail.cfm?ReleaseID=596297>.

<sup>269</sup> Comcast Corp.'s, General Electric Co.'s, and NBC Universal Inc.'s Applications and Public Interest Statement, In re Matter of Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licenses, MB Docket No. 10-56, at 70 (filed Jan. 28, 2010).

<sup>270</sup> Comcast also complains that implementation of the news neighborhooding condition would burden its First Amendment rights. See Answer, ¶¶ 37-38. Comcast, however, is precluded from raising this argument. Because Comcast accepted the Commission's grant with the news neighborhooding condition instead of utilizing the administrative hearing process set forth in the Commission's regulations, it is now precluded from challenging that condition. See 47 CFR § 1.110; *Cent. Television v. FCC*, 834 F.2d 186 (D.C. Cir. 1987). While Comcast maintains that the Commission should not substitute its judgment of what type of channel groupings are "significant" and which channels are "news" channels for Comcast's and warns the Commission against attempting to distinguish between different types of networks, see Answer, ¶ 37, Comcast agreed to allow the Commission to take these steps when it accepted the news neighborhooding condition. Furthermore, while Comcast claims that "governmental requirements mandating carriage must be



With respect to any impact on Comcast's customers, there is no reason to believe that such confusion will be any worse than has been the case with respect to the thousands of channel changes that Comcast has recently implemented, including those that had the effect of benefitting its affiliated channels. Additionally, Comcast ignores the value of neighborhooding for consumers. In the long run, its customers will benefit from an expanded news neighborhood where more channels will be organized by genre.<sup>271</sup> As industry expert David Goodfriend explains, "the addition of other news channels into the existing neighborhoods on Comcast headends will be a benefit to consumers as it will become a larger neighborhood with news channels grouped more logically and news channels easier to find." Ex. C, ¶ 36.

**D. Any Burdens Associated with the News Neighborhooding Condition Were Not Unforeseen by the Commission**

During the merger proceeding, Comcast and Bloomberg forcefully disputed the burdens associated with channel relocations. Comcast argued that a neighborhooding condition would impose substantial burdens upon the company, and that customer confusion would result from channel lineup changes.<sup>272</sup> Bloomberg countered that Comcast's arguments were disproven by the

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subject" to heightened First Amendment scrutiny, *id.*, the news neighborhooding condition does not require Comcast to carry any additional channels on its headends, and Bloomberg has not asked that BTV be added to any Comcast headend on which it is not currently being carried. Finally, it is well settled that regulation by the Commission of MVPDs' programming selection practices in order to deal with barriers to effective competition passes First Amendment scrutiny. *See generally Cablevision Sys. Corp. v. FCC*, Case No. 10-1062 (D.C. Cir. Jun. 10, 2011), at 27-28; *In re Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, Second Report and Order*, FCC 11-119, ¶ 32 (2011) (noting that the Commission's program carriage rules are consistent with the First Amendment).

<sup>271</sup> Letter from Stephen Díaz Gavin, Counsel for Bloomberg, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-56, at 3 (filed Sept. 30, 2010).

<sup>272</sup> *See* Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket 10-56, at 2 n.4 (Nov. 22, 2010) (pointing out that Comcast's factual and economic evidence demonstrates that neighborhooding is not an "easy-to-implement" solution that "can be accomplished with minimum disruption to customers"); Letter from Michael H. Hammer, Willkie Farr & Gallagher

evidence that Comcast changes its channel lineup often,<sup>273</sup> and that “[a]ny resulting confusion would be quickly remedied by the ease with which consumers would find channels once they are organized more logically.”<sup>274</sup>

Comcast now argues that Bloomberg’s interpretation of the news neighborhooding condition is flawed because it is inconsistent “with the Commission’s intent to minimize disruptions to consumers and other programming networks.”<sup>275</sup> However, as reviewed above, Comcast is unable to point to any passage of the FCC Order where the Commission expressed such an intent. Rather, when discussing the news neighborhooding condition, the Commission emphasized the importance of news programming to the public interest.<sup>276</sup> Comcast attempts to explain away the absence of any support in the FCC Order for its argument by contending that “if the Commission had believed that it was adopting a condition that would trigger the disruption, costs, and consumer confusion described [in the Answer], it would have addressed that in some way—especially since Comcast pointed much of this out on the record.”<sup>277</sup> This argument, however, presupposes that the Commission actually believed that relocating independent news channels would impose the burdens described by Comcast. There is no indication in the FCC Order, however, that the Commission agreed with Comcast’s description of these burdens rather than Bloomberg’s arguments that such

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LLP, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-56 (Oct. 22, 2010) (arguing that neighborhooding would cause significant disruption for other programming networks, “confuse and upset consumers loyal to the moved networks,” and result in increased costs and burdens); Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-56, at 2 (Aug. 13, 2010) (stating that “changing channel line-ups is very difficult” and generates “consumer confusion and dissatisfaction”).

<sup>273</sup> Dec. 8, 2010 Ex Parte at 6.

<sup>274</sup> *Id.*

<sup>275</sup> See Answer, ¶ 36.

<sup>276</sup> See FCC Order at 4287, ¶ 122.

<sup>277</sup> See Answer, ¶ 87.

burdens would be minimal. Indeed, the Commission may not have addressed the alleged burdens associated with channel changes precisely because the record in the merger proceeding was replete with evidence that Comcast changed its channel lineups often.

Furthermore, to the extent that the Commission's silence on the cost issue favors either party in this dispute (as opposed to being a neutral factor), that silence weighs on Bloomberg's side of the scales. This is because if the Commission had decided against imposing a meaningful news neighborhooding condition upon Comcast because of concern about the disruptions caused by channel relocations, it would have expressed that concern at some point in the FCC Order.

In the end, Comcast clings to the Commission's description of the news neighborhooding condition as "narrowly tailored" as evidence that the Commission did not wish to require Comcast to relocate any channels. Such an intent, however, is nowhere expressed in the FCC Order. Rather, paragraph 122 of the Order makes clear that the news neighborhooding condition is "narrowly tailored" because it does not represent "a requirement that Comcast affirmatively undertake neighborhooding" but rather only obligates the company to place independent news channels in existing news neighborhoods and those it chooses to create in the future.<sup>278</sup> Additionally, under Bloomberg's interpretation of the news neighborhooding condition, the Commission's description of that condition as "narrowly tailored" is apt for at least two other reasons: (1) it does not apply to any programming genre but news; and (2) it only benefits a subcategory of news channels ("independent news channels") rather than all news channels.<sup>279</sup> By contrast, the Commission could have recommended more widespread neighborhooding in order to ameliorate anticompetitive

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<sup>278</sup> See FCC Order at 4287, ¶ 122.

<sup>279</sup> While Bloomberg's interpretation of the news neighborhooding condition renders it narrowly tailored, Comcast's interpretation would render it a nullity. See *supra* Section III.D.



behavior, as the Enforcement Bureau recently recommended as an option in a program carriage complaint.<sup>280</sup>

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At the end of the day, the Commission should not allow Comcast to use this proceeding as a forum for relitigating the merits of the news neighborhooding condition. While Bloomberg has demonstrated that Comcast has substantially exaggerated the alleged burdens associated with implementation of the condition, this issue is really beside the point. The Commission adopted the news neighborhooding condition, Comcast accepted it, and the Commission must now enforce it as written. Comcast's policy arguments do not alter the meaning of the condition. They do not turn the meaning of "now or in the future" into "the future." Neither do they turn the meaning of "a significant number or percentage" of news channels into "all or a substantial majority" of news channels.

## V. THE COMPLAINT SHOULD NOT BE SENT TO AN ADMINISTRATIVE LAW JUDGE

Before Bloomberg may obtain any relief from the Commission, Comcast asks that the Complaint be designated for hearing before an administrative law judge.<sup>281</sup> This request is little more than a transparent and cynical maneuver designed to delay the resolution of the case and run

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<sup>280</sup> In re Tennis Channel, Inc. v. Comcast Cable Commc'ns., LLC, MB Docket No. 10-204 File No. CSR-8258-P (July 8, 2011) ("The Bureau recommends that the Presiding Judge should also direct Comcast to end its discrimination in terms of channel placement: the Presiding Judge should either require Tennis Channel to be carried on a channel proximate to Golf Channel or Versus as Tennis Channel requests or should require Comcast to create a 'sports neighborhood' (similar to the 'news neighborhood' required by the *Comcast Merger Order*) and require that Tennis Channel be located in the same neighborhood with Golf Channel and Versus"). *Id.* at 16.

<sup>281</sup> See Answer, ¶ 99.